

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

EARNEST E. STORKES,

] MAY 4 1966

Petitioner and Appellant,

] WM. B. LUCK, CLERK

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
and LAWRENCE E. WILSON, Warden,
California State Prison,
San Quentin, California,

] No. 20860 ✓

Respondents and Appellees.

APPELLEES' BRIEF

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JURISDICTION

The jurisdiction of the United States District Court, Northern District of California, Southern Division, to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code § 2241. The jurisdiction of this Court is conferred by Title 28, U.S.C. § 2253.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

Appellant Earnest E. Storkes was convicted of violation of section 245 of the California Penal Code on April 24, 1961 (CT 15). ^{1/} Appellant did not appeal his conviction (CT 2).

1. The initials "CT" as used herein refer to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal.

Appellant's petition for a writ of habeas corpus filed in the California State Supreme Court was denied on February 11, 1965 (CT 6).

B. Proceedings in the Federal Courts

On July 30, 1965, appellant filed an application for writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 1). On July 30, 1965, the District Court issued an order denying the petition for writ of habeas corpus on the grounds that Carrizosa v. Wilson, 244 F.Supp. 120 (N.D.Cal. 1965) held that Escobedo v. Illinois, 378 U.S. 478 (1964) does not apply retroactively to affect convictions final before June 22, 1964, and that it was clear that appellant's conviction must have become final not later than some time in 1961 (CT 15, 16).

Appellant applied for a certificate of probable cause on December 1, 1965 (CT 17, 18). An order granting the certificate of probable cause and leave to proceed in forma pauperis was issued on March 1, 1966 (CT 24).

ARGUMENT

THE ESCOBEDO RULE SHOULD NOT BE APPLIED RETROACTIVELY TO APPELLANT'S CONVICTION WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION

Appellant seeks to upset his conviction by urging that the exclusionary rule in Escobedo v. Illinois,

supra, should not be applied retroactively. Judgment of conviction was entered against appellant on April 24, 1961 (CT 15). Appellant did not appeal his conviction (CT 2). Escobedo was decided on June 22, 1964. Thus, appellant's conviction was final long before the decision was rendered in Escobedo.

The United States District Court, Northern District of California, Southern Division, has ruled in Carrizosa v. Wilson, supra, 244 F.Supp. 120 (N.D.Cal. (1965) that Escobedo may not be applied retroactively. The District Court below rejected appellant's contention, based upon Escobedo, solely upon the authority of Carrizosa v. Wilson, supra. The Carrizosa case is before this Court (No. 20304), and the issue of retroactivity of Escobedo has been extensively briefed therein by the California Attorney General's Office. Additional copies of the Carrizosa brief have been filed with this Court for its use in the instant appeal, and a copy has been served on appellant Storkes. The argument as presented in the Carrizosa brief is hereby incorporated by reference into this brief, and we submit, completely disposes of appellant's contention in this regard. The District Court therefore properly rejected those contentions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: April 29, 1966.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: April 29, 1966

JACKSON L. SMITH
Deputy Attorney General

